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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MORIN BELTRAN, JR.,

Defendant and Appellant.

F037508

(Super. Ct. No. 81079)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Robert T. Baca, Judge.†

M. D. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Acting Assistant Attorney General, J. Robert Jibson and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

*Before Dibiaso, Acting P.J., Buckley, J. and Reed, J.†

†Judge of the Tulare Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

‡Retired judge of the Kern Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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This appeal involves a criminal defendant (appellant) who claimed to be “not feeling well” on the second day of his felony jury trial. Although, neither appellant nor his defense attorney specifically asked the court to continue the trial, appellant now claims his convictions must be reversed because the court did not do so. We find the trial court did not abuse its discretion by not continuing the trial and that appellant has failed to show he was prejudiced by the court’s decision. The judgment is affirmed.

PROCEDURAL HISTORY

Appellant was accused by information of committing felony grand theft, in violation of Penal Code section 487, subdivision (a), and felony possession of heroin, in violation of Health and Safety Code section 11350, subdivision (a). A jury found appellant guilty on October 12, 2000, of misdemeanor petty theft, in violation of section 488, a lesser included offense to grand theft, and possession of heroin as alleged in the information.

On January 17, 2001, the court denied probation and imposed the upper term of three years for the violation of possession of heroin and six months in jail to be served concurrently with the prison term. Restitution fines were also imposed.

The underlying facts of appellant’s convictions are not relevant to appellant’s claim of error regarding a denial of his implied request to continue the jury trial. Therefore, we do not recite the facts here.

DISCUSSION

1. The Record

On October 10, 2000, appellant’s case was sent to Judge Robert T. Baca for jury trial. Prior to commencement of trial, appellant asked for and received a *Marsden*¹ hearing which was denied. Appellant also asked to have another judge hear his case. The court, by implication, also denied this request. After hearing in limine motions, the court began selecting the jury, but did not conclude selection that day. The next day, prior to resuming

¹*People v. Marsden* (1970) 2 Cal.3d 118.

impanelment of the jury, the following exchange occurred between appellant, his defense attorney and the court:

“[DEFENSE COUNSEL]: ... I’m going to ask the Court to let my client address you on the issue of how he’s feeling today. I was running a few minutes late because I was stuck at a sentencing in Department 4. As soon as I got here my client said he needed to talk to me and he advised me that he is not well. The general condition that he has is pain throughout, I guess it would be the right side of his body, because the right side of his face is swelling. His eye is somewhat closed. His right hand is visibly swollen and definitely swollen in relation to his left. He advised me that he did contact a medical health person this morning. Based on what he described to be his symptoms they advised him that he should come over for an examination, but he tells me he is feeling very poor. And again, I would ask him to address the Court just in terms of his feelings, because I’m not sure I can —

“[APPELLANT]: Your Honor, I was taking medication at the jail, and before I was released they were giving me Prozac and they were giving me something for my nerves and stuff, and I haven’t been able to take anything because I’ve been out so shortly, and it has been over the weekend, and Monday I couldn’t get ahold [*sic*] of anybody because of a holiday. And I woke up this morning and my eye was closed to the point where I had to put a pad on it. It’s still a little swollen now. All the side of my head is hurting. This hand is completely starting to swell and I don’t feel well, your Honor.

“THE COURT: You what?

“[APPELLANT]: I don’t feel well.

“THE COURT: You seemed to be in perfect health yesterday.

“[APPELLANT]: I was all right yesterday. I was fine. I woke up this way.

“THE COURT: You didn’t want to go to trial yesterday. That was obvious. You wanted to disqualify me. You wanted to do everything in your power to keep from going to trial yesterday, and now you come in, and I have had lawyers and all of that who insist they don’t want to go to trial, and when we go to trial anyway, then the next day they come in sick.

“[APPELLANT]: If your Honor wants me to stay, I’ll stay.

“THE COURT: I want you to stay, and what you should do is go to a doctor and check into a hospital if you are sick, but I’m not going to abort this trial now that we’re in the middle of picking the jury.

“[APPELLANT]: All right. That’s fine with me.

“THE COURT: But we’ll keep an eye on you. We’ll keep a close eye on you as we go along.

“[DEFENSE COUNSEL]: That’s all I had.”

2. The Law

Penal Code section 1050, subdivision (e) states: “Continuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause.”

A trial court has broad discretion in ruling upon a request for a continuance. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; *People v. Howard* (1992) 1 Cal.4th 1132, 1171.) A denial of a motion to continue must not be so arbitrary as to violate due process. When considering a motion to continue, the court must examine the circumstance of each case as well as the reasons for the request. (*People v. Byoune* (1966) 65 Cal.2d 345, 347; *People v. Smithey* (1999) 20 Cal.4th 936, 1011.) The court in *People v. Samayoa* (1997) 15 Cal.4th 795 stated:

““The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.” [Citations.] In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of his or her motion for a continuance does not require reversal of a conviction. [Citations.]” (*Id.* at p. 840.)

3. The Analysis

The circumstances of this case include: at least one prior implied request by appellant to continue the trial; neither appellant nor his defense attorney expressly asking for a continuance; and no indication by appellant that he was unable to proceed with the trial. While appellant did state his eye was “a little swollen now,” the “side of [his] head [was] hurting,” and “[t]his hand is completely starting to swell and I don’t feel well,” he did not state that his ills prevented him from continuing with the trial already in progress. *To the*

contrary, appellant stated “[i]f your Honor wants me to stay, I’ll stay,” and that it was “fine” with him not to abort the trial.

It is apparent the court believed appellant was attempting to stall the trial by fabricating or exaggerating illness, and on that basis the court elected to “go along” and “keep an eye” on appellant. Given the circumstances of the case, the court did not abuse its discretion by denying appellant’s implied motion to continue the trial. Furthermore, appellant does not point to anything in the record that indicates he was prejudiced by the court’s decision.

Lastly, for these same reasons, appellant has failed to show a violation of his federal constitutional rights to due process of law under the Fifth or Fourteenth Amendments to the United States Constitution.

DISPOSITION

The judgment is affirmed.